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COMMENTS

PACKING HEAT? DEFINING THE SCOPE OF THE TRANSPORTATION SECURITY ADMINISTRATION’S AUTHORITY TO PROTECT AMERICA’S AIRPORTS

Moira Bergin*

The outcome of America’s latest federalism battle could have lasting effects on the federal government’s ability to enforce regulations intended to protect Americans from future terrorist attacks. While some of the players are new,¹ the plot is old.

On May 14, 2008, the governor of Georgia signed into law legislation permitting licensed individuals to carry concealed firearms in certain public places.² This legislation, the Business Security and Employee Privacy Act, allows the concealed carry of firearms “in all parks, historic sites, and recreational areas . . . and in public transportation,” subject to federal statutory prohibitions.³

When the Act took effect on July 1, 2008,⁴ the general manager of the Hartsfield-Jackson Atlanta International Airport—which is owned by the city of Atlanta⁵—released a statement declaring the airport a “gun-free zone.”⁶ The

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¹ J.D. Candidate, May 2010, The Catholic University of America, Columbus School of Law; B.A., 2003, University of Maryland. The author wishes to thank her parents and sister for their love and guidance, and the superb staff of the Catholic University Law Review for their hard work and patience.


³ Id. While this legislation acknowledges possible federal law conflicts, a related Georgia statute reserves the internal regulation of firearms solely to state law, and prohibits municipalities within Georgia from enacting ordinances or other laws pertaining to the sale, transport, ownership, or carriage of firearms. GA. CODE ANN. § 16-11-173 (2007).


general manager cited section 16-11-127 of the Georgia Code—which bars firearms at public gatherings—as the legal basis for issuing the declaration. Additionally, the general manager expressed concern that the presence of firearms at the world’s most-traveled airport would significantly jeopardize the safety and security of daily operations.

Georgia State Assemblyman Tim Bearden, the sponsor of the Act, and GeorgiaCarry.Org, Inc., a gun-rights advocacy group, filed suit against the city of Atlanta in federal court on July 1, 2008, alleging that the airport gun ban violated section 16-11-173 of the Georgia Code and various provisions of the United States Constitution. In response, the city of Atlanta asserted that the language of the Act which allows licensed individuals to carry concealed weapons on public transportation did not apply to airports and, therefore, did not conflict with section 16-11-173. In addition, the City raised a counterclaim alleging that the Georgia statute, if applicable to airports, violated the Supremacy Clause of the United States Constitution because federal legislation regulates security programs at domestic civil airports. While the case was pending, the Atlanta airport petitioned the Transportation Security Administration (TSA) to modify its Airport Security Plan to ban firearms throughout the Hartsfield-Jackson Airport complex.

The district court eventually dismissed the gun-rights group’s lawsuit, finding that the Act did not apply to airports, and the Court of Appeals for the

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7. Id.; see GA. CODE ANN. §16-11-127(a)-(b) ("[P]ublic gathering’ shall include, but shall not be limited to . . . publicly owned or operated buildings . . . ").
8. Press Release, Hartsfield-Jackson Atlanta Int’l Airport, supra note 1. The general manager, in his statement, also agreed with the President of the American Association of Airport Executives, who earlier emphasized the vulnerabilities in aviation security that were highlighted after the attacks on September 11, 2001. Id. Ultimately, the general manager stated that, notwithstanding the enactment of the Act, individuals carrying a concealed firearm anywhere on the airport’s property would be committing a misdemeanor. Id.; Associated Press, Lawsuit Filed Over Atlanta Airport Barring Guns, MSNBC.com, July 1, 2008, http://www.msnbc.msn.com/id/25479434/.
11. Complaint at 1, 7–9, GeorgiaCarry.Org, Inc. v. City of Atlanta, 602 F. Supp. 2d 1281 (N.D. Ga. 2008) (No. 1:08-CV-2171-MHS), aff’d, 318 F. App’x 851 (11th Cir. 2009); see also John Sullivan, Airport’s Ban on Guns is Disputed in Atlanta, N.Y. TIMES, July 2, 2008, at A12.
Eleventh Circuit affirmed.\textsuperscript{16} This disposition leaves unanswered the question that is the focus of this Comment: whether federal statutes and regulations pertaining to airport security preclude state legislation permitting concealed firearms at airports.

The federal government has regulated aviation safety and security standards since 1926, enacting statutes and regulations under its constitutional authority to regulate interstate commerce.\textsuperscript{17} Federal control over aviation has expanded as new threats to aviation security have emerged during the subsequent decades.\textsuperscript{18} Congressional legislation concerning aviation has had two main objectives: (1) ensuring the viability of the airline industry as a vehicle for economic growth and (2) making air travel safe.\textsuperscript{19}

These goals were reflected in two pieces of federal legislation regarding aviation enacted in response to the devastating terrorist attacks of September 11, 2001.\textsuperscript{20} The first statute, passed only ten days after the attacks, was a bailout designed to stabilize the cash-strapped aviation industry.\textsuperscript{21} The second statute, passed immediately before Thanksgiving in 2001, was designed to restore public confidence in air transportation.\textsuperscript{22} The Aviation and Transportation Security Act (ATSA), among other things, created TSA by consolidating the transportation security functions of several federal agencies.\textsuperscript{23} This statute provides specific directives regarding airport security

\begin{enumerate}
  \item GeorgiaCarry.Org v. City of Atlanta, 318 F. App'x 851, 852 (11th Cir. 2009) (unpublished per curiam opinion).
  \item See ALEXANDER T. WELLS, AIRPORT PLANNING AND MANAGEMENT, 7–9, 12–17, 22 (2d ed. 1992).
  \item See 147 CONG. REC. H8300, H8301 (2001) (statement of Rep. Young) (expressing the legislation’s objectives, House Transportation and Infrastructure Committee Chairman Don Young explained, “people flying on American airlines will know that that plane is going to arrive safely at their destination without the opportunity of any future terrorism”); \textit{id.} (statement of Rep. Oberstar) (agreeing with Chairman Young, committee Ranking Member James Oberstar observed, “[the ATSA] will substantially enhance security and restore airline finances more than [the Air Transportation Safety and System Stabilization Act] that was passed a few days ago”).
  \item Krause, \textit{supra} note 18, at 250. Under the ATSA, the TSA acquired greater law enforcement power than had been vested in agencies that had previously performed transportation security activities, reflecting Congress’s intent to more vigorously combat threats to the national transportation system. See Dara Kay Cohen et al., \textit{Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates}, 59 STAN. L. REV. 673, 686 (2006); Krause, \textit{supra} note 18, at 250.
\end{enumerate}
check points{24} and gives TSA authority over general airport security.{25} However, the full scope of TSA’s general airport security authority has not yet been defined.{26}

When TSA received the city of Atlanta’s request to ban concealed firearms on all airport property, a spokesman released a statement implying that TSA was unsure whether it had the authority to approve such a request.{27} The Georgia district court’s decision to dismiss GeorgiaCarry.Org’s complaint provided no additional guidance as to the scope of TSA’s authority, because the grounds for dismissal were unrelated to federal airport security.{28}

For TSA to assert legitimate authority, airports must fall within Congress’s powers to regulate and Congress must have delegated that regulation authority to TSA. Given the lack of relevant case law, the scope of TSA’s authority is assessed best: (1) through analysis of the ATSA’s language and legislative history; (2) through case law resolving questions challenging the authority of the Federal Aviation Administration and similar federal agencies; and (3) by analyzing recent trends in judicial interpretation of the Commerce and Supremacy Clauses.

This Comment seeks to determine the scope of TSA’s authority by examining the history of federal aviation regulation, the new challenges to ensuring aviation security, and jurisprudence regarding the scope of federal power under the Commerce and Supremacy Clauses. First, this Comment provides a brief description of the underlying delegation powers possessed by Congress that determine the scope of agency administrative authority. Next, it analyzes past federal aviation laws to demonstrate that Congress has deliberately increased the role of federal regulators in aviation security over time to protect airports and air travel as a channel of interstate commerce. This Comment then considers the ATSA’s legislative history and the regulations

{25} 49 U.S.C. § 114(d)(1), (f).
{26} Id. § 114(f)(11). Because TSA was created less than a decade ago, case law defining the scope of its authority is limited.
{27} Frank, supra note 14 (describing the city of Atlanta’s request as raising “some complex legal issues,” a TSA spokesperson emphasized that “[a]ny decisions we make that affect (Atlanta) could affect every other airport in the country”). In an August 7, 2008, letter to the House Committee on Homeland Security Chairman Bennie Thompson regarding the authority of TSA to ban guns throughout airport property, Department of Homeland Security (DHS) Assistant Secretary Kip Hawley acknowledged that TSA has “the authority to issue regulations and security directives and to approve airport security programs,” but remained uncertain as to whether that authority extended to the power to ban guns. Letter from Kip Hawley, Assistant Sec’y, Dep’t of Homeland Sec., to Bennie G. Thompson, Chairman, H. Comm. on Homeland Sec. (Aug. 7, 2008) (on file with author). Specifically, Hawley stated “[w]ith respect to firearms, state and local law has traditionally determined the legal implications for carrying firearms on airport property outside of restricted areas such as the sterile area.” Id. Further, he asserted that “[f]ederal law anticipates that persons other than law enforcement officers will have firearms at airports.” Id.
that TSA has promulgated to implement the statute. This portion of the analysis illustrates the comprehensive and pervasive nature of federal regulations that preempt state regulations. This Comment then discusses case law defining the scope of authority under the Commerce and Supremacy Clauses held by previous agencies charged with transportation security. It then analyzes current case law interpretations of the Commerce and Supremacy Clauses to support the conclusion that TSA has authority over the security operations throughout airports, not merely at screening checkpoints and within secured areas. This Comment ultimately concludes that TSA’s authority to impose security regulations is not limited to areas within security checkpoints, but exists throughout the airport property and that TSA must exercise this authority to fulfill its mandate under ATSA.

I. THE HISTORY AND CONSTITUTIONAL BASES OF AVIATION REGULATION: LAYING THE FOUNDATION FOR A STRONGER FEDERAL REGULATORY SCHEME GOVERNING AIRPORT SECURITY

A. The Delegation Doctrine Allows Congress to Vest Agencies with Regulatory Authority

Although the Constitution demands that Congress carry out the legislative duties enumerated in Article I, Congress is permitted to delegate certain duties to administrative agencies under the Necessary and Proper Clause.29 The powers delegated by Congress must bear an “intelligible principle” to which the agency’s actions must conform, meaning that Congress must limit the agency’s power to implement congressional policies, rather than allow the agency to develop its own policies.30 Despite case law insisting on firm boundaries to powers delegated by Congress,31 the Supreme Court has held that broad grants of authority are consistent with constitutional separation of powers.32 For example, in National Broadcasting Co. v. United States, the Court found that the terms “public interest, convenience, or necessity” sufficiently limited the Federal Communication Commission’s regulatory authority, thereby dismissing a non-delegation doctrine challenge.33

29. U.S. CONST. art. 1, § 8, cl. 18; A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935) (reiterating that Congress is permitted to delegate authority to administrative agencies to promulgate rules and regulations on a particular topic within a defined scope to achieve congressionally defined objectives).
33. Id. at 216; see also Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472–74 (2001) (finding that the phrases “requisite to protect the public health” and “adequate margin of safety,” as included in the Clean Air Act, provided sufficient direction to the Environmental Protection Agency and sufficiently limited the agency’s power to withstand a separation of powers attack).
Thus, under the non-delegation doctrine agencies can only act at the explicit
behest of Congress. \(^{34}\) When Congress makes its intent clear through a statute,
the agency has no power to impose its own interpretation and must carry out
the statute’s commands. \(^{35}\) The agency is not permitted to establish a policy
contarily to what Congress intended. \(^{36}\)

B. Congress Enacts Increasingly Pervasive Legislation to Ensure Federal
Control of Air Transportation Security

The history of federal aviation law provides important insight into the basis,
purpose, and scope of TSA’s authority. \(^{37}\) Since the inception of commercial
aviation, the federal government has viewed the aviation sector as a
fundamental mode of American commerce. \(^{38}\) Federal regulation of the
aviation industry began in 1926 when Congress passed the Air Commerce
Act. \(^{39}\) While the legislation included some security provisions, \(^{40}\) Congress’s
primary goal was to provide a framework of federal regulations that would
enable the American economy to fully exploit the potential of aviation. \(^{41}\)
Under the Air Commerce Act, the Secretary of Commerce could regulate air
traffic and pilot licensing in civil aviation, \(^{42}\) but municipalities retained control
over airports and landing fields as long as local rules did not interfere with
interstate commerce. \(^{43}\)

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36. Normand J. Singer & J.D. Shambie Singer, Statutes and Statutory
Construction § 65:1 (7th ed. 2008) ("Where an agency has been charged with administering a
law, it may not substitute its own policy for that of the legislature.").
1958).
40. Id. § 344, 44 Stat. at 571 (preserving the War Department’s power to designate certain
routes as military airways); id. § 344, 44 Stat. at 572 (“The Congress hereby declares that the
Government of the United States has, to the exclusion of all foreign nations, complete sovereignty
of the airspace over the lands and waters of the United States . . . .”).
41. See id. § 344, 44 Stat. at 568-69. The Air Commerce Act charged the Secretary of
Commerce with assessing aviation development, implementing policies to facilitate growth of air
commerce, and ensuring public confidence in aviation by reporting findings of its air
transportation accident investigations. Id; see also Current Legislation: The Air Commerce Act
of 1926, 27 Colum. L. Rev. 989, 990-91 (1927) (explaining legislative provisions regarding the
investment in meteorological technology and establishing emergency landing fields to encourage
public confidence in air travel).
42. Fed. Aviation Admin., A Brief History of the Federal Aviation
Administration, http://www.faa.gov/about/history/brief_history/index.cfm?print=go (last
43. Air Commerce Act § 344, 44 Stat. at 570; see George W. Lupton, Jr., Civil
Aviation Law 101-02 (1935) (refuting claims that Congress surrendered complete control of
airports to local governments because it retained power to regulate “where ‘essential to the
Over the next thirty years, the structure of federal aviation regulation changed, but the encouragement of air commerce remained its goal. Following two widely publicized airplane crashes, Congress passed the Federal Aviation Act of 1958, which established the Federal Aviation Agency—an independent agency which reported directly to the president. Despite its aggressive approach in imposing federal regulation on the aviation industry, Congress continued to leave the operation of civil airports to local government operators subject to compliance with federal statutes and inspection by the Federal Aviation Agency administrator.

In response to an onslaught of terrorist airline hijackings beginning in the 1960s, the Federal Aviation Administration (FAA) further expanded its authority over aviation security to reduce risks of terrorist hijackings.

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44. BRIEF HISTORY, supra note 42. See Federal Airport Act, Pub. L. No. 79-377, § 251, 60 Stat. 170, 171-72, 176-77 (1946) (amended 1994) (directing the Administrator of Civil Aeronautics to provide localities with federal funds to construct airports and provide office space at no cost to federal agencies performing air traffic control or necessary meteorological activities); Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 601, 52 Stat. 973, 984-86 (repealed 1958) (directing the Administrator of Civil Aeronautics to draft annual comprehensive national airport development plans and to provide localities with federal funds to construct airports).

45. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731; John W. Gelder, Comment, Air Law—The Federal Aviation Act of 1958, 57 MICH. L. REV. 1214, 1215 (1959). Congress created the Agency to, among other things, instill confidence in the safety of air transportation for both passengers and businesses that would use it for shipping. George A. Bermann, Regulatory Cooperation with Counterpart Agencies Abroad: The FAA’s Aircraft Certification Experience, 24 LAW & POL’Y INT’L BUS. 669, 674-75 (1993). The legislation marked Congress’s effort to consolidate all aviation oversight functions into one federal entity. Gelder, supra, at 1215. Congress charged the FAA with promoting air commerce, implementing universal air traffic safety rules, operating air traffic control facilities, and approving airport development plans. See Federal Aviation Act of 1958, § 307(a)-(c), 72 Stat. at 749-50; § 309, 72 Stat. at 751 (barring construction of non-federally funded airports or landing areas without FAA approval); § 307, 72 Stat. at 749-50, 806 (repealing the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938 and consolidating authority over military and civil regulation of all navigable airspace under the FAA Administrator).

46. See supra note 44 and accompanying text.


48. Krause, supra note 18, at 234.

49. See Department of Transportation Act, § 3(2), 80 Stat. 931, 932 (1966) (changing the Federal Aviation Agency’s name to the Federal Aviation Administration).

50. Krause, supra note 18, at 234, 236; BRIEF HISTORY, supra note 42. In 1966, the Federal Aviation Agency’s name was changed to the Federal Aviation Administration and it was...
Congress continued to aggressively expand the FAA’s role in airport security through the 1990s.\(^{51}\) By 2001, the FAA had the authority to oversee air carriers’ passenger screening procedures, respond to threats to civil aviation, and demand that foreign airports meet certain security standards.\(^{52}\) Despite its growing role in aviation security, FAA regulations issued pursuant to federal law provided only patchwork protections that were insufficient to counter emerging threats to aviation security.\(^{53}\)

The terrorist attacks of September 11, 2001, ushered in a new era of aviation regulation.\(^{54}\) In a sweeping effort to federalize airport security, Congress incorporated within the newly established Department of Transportation (DOT). Department of Transportation Act § 3(e)(1)-(2), 80 Stat. at 932.

51. See Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, §§ 101-12, 104 Stat. 3066, 3067, 3069-70. After the terrorist bombing of Pan Am flight 103 in 1988, Congress created two transportation security posts—the Director of Intelligence Security within the Office of the Secretary of DOT and the Administrator for Civil Aviation Security—and charged the FAA with facilitating federal oversight of security operations at major domestic airports by enacting the Aviation Security Improvement Act. Dempsey, supra note 20, at 707-08. Although the FAA was granted broad power to regulate airport security under the legislation, its role was primarily indirect—to supervise the security plans of air carriers and airport operators, conduct tests to gauge the efficiency of the screening procedures, and make recommendations for improvements. § 106, 104 Stat. at 3075-76. However, Congress also expanded the power of the FAA beyond screening and security plans in its effort to ensure aviation security by granting the FAA the authority to issue regulations on airport construction, which is an essential element of aviation security. § 110, 104 Stat. at 3080.

The DOT’s and the FAA’s new security responsibilities increased the federal role in aviation security, demonstrating Congress’s recognition that security is a vital aspect of national transportation policy and that securing transportation infrastructure is essential to national security. See Dempsey, supra note 20 at 707-08. For a detailed synopsis of federal aviation laws, see id. at 697-98.


53. Krause, supra note 18, at 235-36; see also ROGER W. COBB & DAVID M. PRIMO, THE PLANE TRUTH 123 (2003) (highlighting the FAA’s close relationship with the airlines and its aversion to imposing strict security guidelines); DEMPSEY & GESELL, supra note 52, at 656 (listing criticisms of the FAA, including that the FAA was “in a time warp, resistant to change, defensive, and turf-conscious... and a self-perpetuating bureaucratic morass of inaction and self-protection” (internal quotation marks omitted)); ROBERT M. HARDAY, AIRPORT REGULATION, LAW, AND PUBLIC POLICY 135 (1991) (explaining that the FAA’s lack of “direct operational” authority diminished the Administration’s ability to demand accountability among the airlines and airport operators, thereby jeopardizing airport security). For additional criticisms of the FAA’s security procedures and an analysis of how such procedures might affect TSA, see Gregory Robert Schroer, Doomed to Repeat the Past: How the TSA is Picking Up Where the FAA Left Off, 32 TRANSP. L.J. 73, 73-74 (2004).

established TSA within the Department of Transportation (DOT). Congress’s goal in creating TSA was to establish one federal entity with the authority to monitor threats to national transportation infrastructure and to implement a uniform transportation security protocol. TSA, therefore, consolidated the security functions of numerous transportation agencies. In aviation, Congress shifted all airport security functions previously overseen by the FAA to TSA.

The language in the ATSA delegated plenary authority over airport security to TSA and enumerated a list of specific security responsibilities to be implemented. Specifically, the ATSA stated that TSA “shall be responsible for security in all modes of transportation, including . . . civil aviation security” and shall “oversee the implementation, and ensure the adequacy, of security measures at airports.” Additionally, the ATSA charged TSA with federalizing airport security screening programs. In that respect, TSA’s authority to regulate airport activity is more robust than the authority that the FAA had previously enjoyed.

In addition to the directives relating to the federalization of airport screening personnel and the oversight of daily airport security operations, TSA inherited the FAA’s expansive administrative authority to issue regulations in pursuit of


57. Krause, supra note 18, at 247.


60. Id. § 114(d) (emphasis added).

61. Id. § 114(d)(11) (emphasis added).

62. Id. § 114(e). The statute provides that TSA “shall be responsible for day-to-day screening operations for passenger air transportation.” Id. By directing the TSA to establish employment criteria, employee retention plans, and training and evaluation programs for airport screening personnel, the ATSA fully federalized airport screening procedures. Id. Congress’s deliberate step to require TSA to conduct all airport passenger screening, in an effort to bring national uniformity to airport security, was preceded by a heated congressional debate. Hessick, supra note 55, at 48–52. While some airports were permitted to continue utilizing private screening contractors, their screening protocols were required to meet TSA’s specifications. Id. at 52.


64. 14 C.F.R. § 108.25.

65. 49 U.S.C. § 114(e).
its security mission.\textsuperscript{66} Further, under the ATSA, TSA was instructed to "develop policies, strategies, and plans for dealing with threats to transportation security,"\textsuperscript{67} to "carry out such other duties, and exercise such other powers, relating to transportation security as the Under Secretary considers appropriate, to the extent authorized by law,"\textsuperscript{68} and to "take necessary actions to improve domestic air transportation security by correcting any deficiencies in that security."\textsuperscript{69} Indeed, Congress directed TSA to ensure proper security measures were in place at airports even "before entry into a secured area."\textsuperscript{70}

Recognizing that aviation security is critical to federal domestic security programs,\textsuperscript{71} Congress shifted TSA from the DOT to the Department of Homeland Security (DHS) in the Homeland Security Act of 2002.\textsuperscript{72} At that time, it was well-documented that nearly one-third of terrorist strikes

\textsuperscript{66} See id. § 114(1); Krause, supra note 18, at 250; David T. Norton, \textit{Recent Developments in Aviation Law}, 67 J. Air L. & COM. 1107, 1118, 1120 (2002) (explaining that TSA will "eclipse the FAA in size and scope" and that the Under Secretary's broad authority includes discretionary power to impose biological and chemical technology requirements upon airports).

\textsuperscript{67} 49 U.S.C. §114(f)(3).

\textsuperscript{68} Id. §114(f)(15) (emphasis added).

\textsuperscript{69} 49 U.S.C. § 44904(e).

\textsuperscript{70} 49 U.S.C. § 44903(h)(4)(A).

\textsuperscript{71} \textit{See Department of Homeland Security Act of 2002: Hearing on H.R. 5005 Before the H. Select Comm. on Homeland Security}, 107th Cong. 113 (2002) [hereinafter House Homeland Security Act Hearing] (statement of Rep. DeLay, Member, H. Select Comm. on Homeland Security) ("The TSA was put under the Department of Transportation for whatever reason . . . . [B]ut it's not a transportation agency, it's a security agency. It's a security office."); id. at 153–54 (statement of Rep. Tauscher, Member, H. Select Comm. on Homeland Security) (supporting the move of TSA to the DHS, but recommending that Congress delay the transfer until TSA met previously established program deadlines); 148 CONG. REC. 22132 (2002) (statement of Rep. Dingell) (opposing the shift of TSA to the DHS due to the concern that the hurried transfer would result in "confusion" and "bureaucratic chaos," and because of lingering doubts about the effectiveness of the new department, but recognizing that airport security is essential to domestic security and should be regulated by a federal entity); Press Statement, S. Governmental Affairs Comm., Lieberman States the Case for Homeland Security Department (Aug. 30, 2002), http://hsgac.house.gov/public/archive1083002press.htm (identifying transportation security as an essential function of the new DHS and claiming that Congress’s failure to consolidate domestic security agencies would leave the country “ill equipped to defend against our terrorist enemies”); see also Letter from Bennie G. Thompson, Chairman, H. Comm. on Homeland Sec., to Kip Hawley, Assistant Sec’y, Dep’t of Homeland Sec. (July 21, 2008) (on file with author) (weighing in on Atlanta’s request to ban concealed weapons at Hartsfield-Jackson Atlanta International Airport, expressing his belief that TSA had the authority to ban weapons throughout the airport because “d[oing] otherwise would hamper TSA’s ability to keep our airports secure”).

The belief that aviation security was an essential element of homeland security was well established even before the concept of the DHS came to fruition. The House Conference Report accompanying the passage of ATSA, enacted one year before the Homeland Security Act, concluded “that the safety and security of the civil air transportation system is critical to the security of the United States and its national defense.” \textit{H.R. Rep. No. 107-296} at 53–54 (2001) (Conf. Rep.).

throughout the world involved attacks against a segment of the transportation infrastructure. By shifting TSA from the DOT to the DHS, Congress emphasized its vision of transportation security as an essential component of homeland security that should fall under federal control.

C. TSA Defines Its Authority by Issuing Comprehensive Regulations to Improve Airport Security

Regulations promulgated by TSA further illuminate its authority and demonstrate its role in developing and controlling airport security. Under the


Shifting TSA from the DOT to the DHS also reflected a consensus reached among Bush Administration officials regarding “the importance of transportation security as a major part of America’s overall homeland security.” House Homeland Security Act Hearing, supra note 72, at 94 (statement of Norm Mineta, Secretary of Transportation). Then-Secretary of Transportation Norm Mineta commented: “I believe that it is impossible to create a Department of Homeland Security and not have agencies like . . . the Transportation Security Administration at the heart of it.” Id.

74. See Dempsey, supra note 20, at 717–18. Although one component of the DOT’s mission is to ensure the safety of transportation infrastructure, the DOT’s traditional focus has been facilitating the quick and efficient movement of people and goods. See U.S. DEP’T OF TRANSP., ABOUT DOT, http://www.dot.gov/about dot.html (last visited Oct. 7, 2009); U.S. DEP’T OF TRANSP., A BRIEF HISTORY, http://dotlibrary.dot.gov/Historian/history.htm (last visited Oct. 7, 2009) (summarizing the history of the DOT, including its functions and missions). This objective could, at times, be at odds with the security practices necessary to protect aviation. See COBB & PRIMO, supra note 53, at 123. The Department of Homeland Security’s primary mission, however, is to promote nationwide domestic security and prevent future terrorist attacks. See U.S. DEP’T OF HOMELAND SEC., ONE TEAM, ONE MISSION, SECURING OUR HOMELAND 3 (2008), available at http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf (“We will lead the unified national effort to secure America. We will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the Nation. We will secure our national borders while welcoming lawful immigrants, visitors, and trade.”). TSA’s mission is to “protect[] the Nation’s transportation systems to ensure freedom of movement for people and commerce.” TRANSP. SEC. ADMIN., MISSION, VISION, AND CORE VALUES, http://www.tsa.gov/who-we-are/mission.shtm (last visited Oct. 7, 2009).

75. See, e.g., 49 C.F.R. § 1542.5 (2008) (granting TSA the right to inspect airports for compliance with their Airport Security Plans at any time); 49 C.F.R. § 1542.101(a) (2008) (requiring airports to comply with TSA regulations and reserving the authority to approve or reject Airport Security Plans submitted by airports). Kip Hawley, Assistant Secretary of the DHS, described the nineteen layers of security that TSA has implemented at domestic airports, specifically stating: “Within airports themselves, TSA is focusing beyond the physical checkpoint—to push our borders out, so to speak—to look more at people and to identify those with hostile intent . . . even if they are not carrying a prohibited item.” One Year Later: Have TSA Airport Security Checkpoints Improved?, Hearing Before the H. Comm. on Oversight and Government Reform, 110th Cong. 31–34 (2007) (statement of Kip Hawley, Assistant Secretary of the Department of Homeland Security) TSA’s layered security program begins “before a passenger even shows up at a TSA checkpoint.”) (emphasis added); see also Travel vs. Terrorism: Federal Workforce Issues in Managing Airport Security, Hearing Before the H.
Code of Federal Regulations section entitled "Airport Security,"\textsuperscript{76} TSA requires every airport to submit an Airport Security Program to the Under Secretary for approval.\textsuperscript{77} To earn TSA's approval, airport operators' security plans must "[p]rovide[] for the safety and security of persons and property on an aircraft operating in air transportation or intrastate air transportation against an act of criminal violence, aircraft piracy, and the introduction of an unauthorized weapon . . . onto an aircraft."\textsuperscript{78} Airport Security Programs can be modified at TSA's discretion when it determines that "safety and the public interest" necessitate amendment,\textsuperscript{79} or when an airport operator requests a modification that TSA finds will promote "safety and the public interest."\textsuperscript{80}

In addition to approving and implementing airport security plans, TSA requires all airport operators to establish clearly marked security checkpoints to prevent unauthorized entry into secured areas.\textsuperscript{81} All passengers are required to undergo TSA screening at these designated checkpoints.\textsuperscript{82} All weapons are barred in secured areas,\textsuperscript{83} and TSA imposes a fine of up to $6000 on any individual interfering with or undermining its security measures.\textsuperscript{84} These detailed airport security regulations form a comprehensive, nationally uniform framework of security requirements with which all airport operators must comply.\textsuperscript{85}

\textit{Subcomm. on Fed. Workforce and Agency Organization of the Comm. on Gov't Reform, 109th Cong. 56-62 (2006) (statement of Robert Jamison, Deputy Administrator of the Transportation Security Administration) (reporting TSA's progress in improving airport security, including the implementation of a layered security plan that protects against terrorist attacks by screening airport employees, installing security equipment in airports, and issuing airport security regulations).

76. 49 C.F.R. § 1542 (2008).
77. 49 C.F.R. § 1542.101 (2008). Every Airport Security Plan must include "[a] description of the sterile areas," airline operations areas, security identification display areas, and boundaries of secured areas. 49 C.F.R. § 1542.103.
78. 49 C.F.R. § 1542.101(a)(1). TSA regulations also require that every airport maintain secured areas, which are defined as portions of the airport where passengers and cargo board, and where domestic and foreign aircraft deplane. 49 C.F.R. § 1540.5 (2008).
79. 49 C.F.R. § 1542.105(c) (2008).
80. 49 C.F.R. § 1542.105(b)(3).
81. 49 C.F.R. § 1540.201(b) (2008).
82. 49 C.F.R. § 1540.107 (2008).
83. 49 C.F.R. § 1540.111(a) (2008). Certain law enforcement personnel are exempt from the weapons ban that applies in secured areas of airports. 49 C.F.R. § 1540.111(b).
85. See Moving Beyond the First Five Years: How the Transportation Security Administration (TSA) Will Continue to Enhance Security for All Modes of Transportation: Hearing Before the Subcomm. on Transp. Sec. and Infrastructure Protection of the H. Comm. on Homeland Sec., 110th Cong. 19–30 (2008) (statement of Cathleen A. Berrick, Director, Homeland Security and Justice Issues, United States Government Accountability Office) (noting that although TSA has made progress, the agency needs to take further action to achieve the
D. Federal Court Decisions Reinforce National Regulation of Aviation Activities Through the Commerce and Supremacy Clauses

Although federal courts have had few occasions to interpret TSA’s authority, given the relative infancy of the agency, they have consistently held that federal regulators have the power to control aviation under both the Commerce Clause (86) and the Supremacy Clause (87).

86. See Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) ("Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive."); Allegheny Airlines, Inc. v. Cedarhurst, 238 F.2d 812, 814 (2d Cir. 1956) (affirming the trial court's decision that Congress had the power to regulate air space and aviation under the Commerce Clause, and that Congress properly exercised this power when it enacted several pieces of legislation that preempted state regulation of air space); Allegheny Airlines, Inc. v. Cedarhurst, 132 F. Supp. 871, 878 (E.D.N.Y. 1955) ("Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water."); see also Jackson v. Airways Parking Co., 297 F. Supp. 1366, 1371, 1373–74 (N.D. Ga. 1969) (holding that a parking lot operator's employee was eligible to sue his employer for violations of the Fair Labor Standards Act, finding that the employee's absence would impede interstate commerce because he worked for the only parking lot operator near the airport).

87. See, e.g., Frank v. Delta Airlines, Inc., 314 F.3d 195, 197–201 (5th Cir. 2002) (rejecting defendant's argument that the preemptive effect of an FAA employee drug testing regulation should be narrowly circumscribed, noting the comprehensive nature of FAA regulations); see also City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638–39 (1973) (holding that the FAA and the Environmental Protection Agency (EPA) have exclusive authority to regulate noise emanating from airports, even though such regulation is a firmly rooted state police power, because the authority granted to the FAA and the EPA is so comprehensive and pervasive as to render local ordinances preempted); Allegheny Airlines, 238 F.2d at 814, 817 (rejecting a municipality's claim that its ordinance regulating airspace under one-thousand feet was not preempted by federal law because Congress did not affirmatively assert authority over airspace below that altitude, holding that Congress had asserted federal authority to regulate all air space by giving a federal entity the power to regulate airline take-offs, landings, and airspace to promote safety and prevent crashes); Jeffrey A. Berger, Comment, Phoenix Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion, 97 NW. U. L. REV. 941, 965–66 (2003) (explaining that the Federal Aviation Act of 1958, which gave the FAA authority over airport development and flight safety rules in an effort to secure air commerce, granted the FAA such comprehensive authority that it would be nearly impossible to find an area of aviation law that the Act did not preempt).
1. Courts Interpret Aviation as an Integral Component of Interstate Commerce

a. Defining the Commerce Clause’s Claw

Congress has the power under the Commerce Clause to direct TSA to regulate airport security. While the Supreme Court has narrowed its interpretation of Congress’s power under the Commerce Clause, the Clause nonetheless grants Congress the authority to regulate channels of interstate commerce, instrumentalities of interstate commerce, and activities that have significant effects on interstate commerce.

88. Although many recent cases addressing the federal government’s power to regulate aviation do not discuss the Commerce Clause and instead analyze only the Supremacy Clause, see, e.g., Burbank, 411 U.S. at 625–27; Frank, 314 F.3d at 197–99, federal control over aviation is historically rooted in the Commerce Clause. Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 274 (1972) (“Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.”). Understanding the contemporary dynamics of the Commerce Clause is, therefore, important to understanding the scope of aviation regulation permitted. L. Anthony Sutin, Supreme Court Watch, AMERICAN BAR ASSOCIATION (2002), http://www.abanet.org/statelocal/law/news/win02supremect.html (last visited Oct. 7, 2009) (explaining that the Supreme Court’s holdings in United States v. Lopez and United States v. Morrison limit Congress’s ability to regulate certain areas of law under the Commerce Clause, but concluding that the ATSA should not face constitutional challenges under those holdings because air transportation is a well established channel of commerce).

89. U.S. CONST. art. 1, § 8, cl. 3. During the first half of the twentieth century, a broad interpretation of the Commerce Clause reshaped the role of the federal government, allowing Congress to claim constitutional authority to regulate areas of law that had traditionally been left to state government control. Lamar J. Jost, Constitutional Law—The Commerce Clause in the New Millennium: Enumeration Still Presupposes Something not Enumerated. United States v. Morrison, 120 S. Ct. 1740 (2000), 1 WYO. L. REV. 195, 204–206 (2001).


91. See Gibbs v. Babbitt, 214 F.3d 483, 490–91 (4th Cir. 2000) (defining channels of commerce as including “navigable rivers, lakes, and canals of the United States; the interstate railroad track system; the interstate highway system; . . . interstate telephone and telegraph lines; air traffic routes; [and] television and radio broadcast frequencies” (internal quotation marks omitted)).

92. See Lopez, 514 U.S. at 558 (defining instrumentalities of commerce as “persons or things in interstate commerce, even though the threat may come only from intrastate activities”); see also Goldberg v. W. Harley Miller, Inc., 197 F. Supp. 509, 511–12 (N.D. W. Va. 1961) (finding a military airport to be an instrumentality of commerce because of the activities occurring within it, including the arrival and departure of flights, the shipment of goods, and the conduct of interstate training flights).

Over time, Congress’s power under the Commerce Clause has ebbed and flowed. The Supreme Court first defined the scope of the Commerce Clause in 1824. In Gibbons v. Ogden, the Court held that the Commerce Clause granted Congress exclusive authority to govern “commercial intercourse” among the states. Congressional authority to regulate activities under the Commerce Clause was expanded further in Wickard v. Filburn. In applying the “cumulative effects” test, the Supreme Court found that even intrastate activities could intrude upon Congress’s commerce power if those activities, when conducted en masse, have a “substantial effect” on interstate commerce. The cumulative effects test gave Congress unprecedented latitude to exercise broad authority under the Commerce Clause.

In a marked shift in its jurisprudence, the Supreme Court constricted the scope of the Commerce Clause when it decided United States v. Lopez in 1995. It continued this trend five years later when it struck down certain provisions of the Violence Against Women Act in United States v. Morrison. Despite legislative findings linking violence against women to the national economy, the Court held that the effects of violence against women were not sufficiently related to interstate commerce. The Court reasoned that if it accepted the link to interstate commerce asserted by the

94. See Lopez, 514 U.S. at 554–57.
95. Gibbons v. Ogden, 22 U.S. 1, 190–95 (1824) (defining the scope of the Commerce Clause as providing Congress with the power to regulate all commerce between the United States and foreign nations, as well as commerce between and “among” states).
96. Id. at 194–95 (explaining that the Commerce power includes the ability to regulate commerce “among several states”). The Court defined commerce “among several states” to mean “intermingled with,” explaining that Congress could regulate commerce within a state if it had an overall effect on interstate commerce. Id. at 195. However, the “completely internal commerce of a State ... may be considered as reserved for the State itself.” Id.
97. See generally Wickard, 317 U.S. 111.
98. Id. at 125, 127–29 (upholding Congress’s right to enforce the Agricultural Adjustment Act, which set quotas on wheat production and consumption against a sustenance farmer’s wheat grown for personal consumption).
99. Jost, supra note 89, at 207–08.
100. United States v. Lopez, 514 U.S. 549, 551 (1995). In Lopez, the Court invalidated the Gun-Free School Zones Act, which prohibited individuals from carrying firearms in school zones, holding that the Act exceeded Congress’s authority under the Commerce Clause because the prohibited conduct did not affect commerce in any real way. Id. at 551, 563–65, 567. The Court explained that Congress had failed to include findings establishing a jurisdictional nexus to link the school gun ban to the chain of commerce. Id. at 561–63, 567. The court ultimately rejected the government’s argument that dangerous or violent school environments prevent students from learning, thereby reducing students’ economic productivity. Id. With respect to Congress’s authority under the Commerce Clause, the Court held that all powers exercised by Congress have “judicially enforceable outer limits.” Id. at 566.
102. Id.
government, the resulting precedent would give Congress blanket authority over police powers traditionally reserved for state governments. The Court declared that the “regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”

b. Courts Uphold Federal Legislation Relating to Air Transportation as Proper under the Commerce Clause

Federal laws regulating airports have been upheld under both the “substantial effects” and the “channel of commerce” tests. Despite the recent trend towards limiting Congress’s power under the Commerce Clause, Wickard’s “substantial effects” test remains good law. For example, in United States v. Corona, the Court of Appeals for the Fifth Circuit upheld Joseph Corona’s conviction under a federal arson statute. Corona argued that the federal government had no authority to criminalize arson, but the court held that because Corona was convicted of burning down a building rented by a taxi company, and the taxi company provided transportation service to interstate travelers going to and from the airport, his conduct substantially affected interstate commerce. The court reasoned that by burning down the taxi company’s building, Corona had frustrated Congress’s interest in “promoting mobility.”

Airports have logically followed as a recognized channel of commerce. For example, in Lee v. United States, the Court of Appeals for the Eighth Circuit affirmed Lee’s conviction for trafficking stolen securities through

103. Id. at 615–16.
104. Id. at 618; see also Sutin, supra note 88.
105. See, e.g., United States v. Corona, 108 F.3d 565, 570–71 (5th Cir. 1997) (applying substantial effects test); United States v. West, 562 F.2d 375, 378 & n.3 (6th Cir. 1977) (recognizing airports as channels of commerce); see also Sutin, supra note 88.
106. See Gonzales v. Raich, 545 U.S. 1, 18 (2005) (relying on Wickard and noting that Congress can regulate noncommercial intrastate activity “if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity”).
107. Corona, 108 F.3d at 571.
108. Id. at 568.
109. Id. at 571. Similarly, in United States v. Hicks, the Seventh Circuit applied the “aggregate effects” test in upholding a conviction under a federal arson statute, which prohibited the intentional burning of buildings associated with interstate commerce. United States v. Hicks, 106 F.3d 187, 189 (7th Cir. 1997). The defendant had burned down a restaurant with an out of state insurance policy, and the court reasoned that “it [did not] take any fancy intellectual footwork to conclude that the aggregate effect of such arsons on commerce is substantial.” Id.; see also Russell v. United States, 471 U.S. 858, 860–62 (1985) (holding that the statute applied to commercially owned apartment buildings because the rental of apartment buildings affects commerce given “the interstate movement of people”).
110. Corona, 108 F.3d at 571.
111. United States v. West, 562 F.2d 375, 378 & n.3 (6th Cir. 1977) (recognizing airports as channels of commerce).
interstate commerce by carrying them from Illinois to Missouri via a commercial airline. Specifically, the court determined that a reasonable jury could find that Lee's presence in the airport with information regarding an interstate flight in his possession indicated that he was trafficking securities in interstate commerce, and the court therefore decided, without discussion, that airports were a channel of commerce. Similarly, in United States v. West, the Court of Appeals for the Sixth Circuit recognized that a provision of the United States Code prohibiting theft in airports, among other locations, was aimed at protecting channels of interstate commerce.

2. Courts Recognize Federal Regulation of Aviation by Applying the Supremacy Clause

a. An Overview of Federal Preemption Power under the Supremacy Clause

State regulations affecting airport security are null and void if they are preempted by federal law or TSA regulations. Article IV, clause 2 of the Constitution states that "the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land." Under the Supremacy Clause, state laws and regulations are preempted by federal statutes and regulations when federal laws expressly or implicitly manifest an intent to preempt state laws. Traditionally, the federal government has been required to clearly express its intent to preempt state law, particularly when federal law seeks to supersede traditional state police powers. However, the federal
government can overcome this presumption when the legislation in question pertains to an area of "unique federal concern."\(^{120}\)

Because the ATSA contains no express language proscribing state legislation, the implied preemption test must be applied.\(^{121}\) There are two forms of implied preemption: (1) field preemption and (2) conflict preemption.\(^{122}\) Field preemption occurs when congressional regulation of an activity is so pervasive, or its interest in regulating that activity is so strong, that it is clear that Congress intended to be the sole regulator of that field.\(^{123}\) Conflict preemption occurs when a state law undermines the objectives of a federal law.\(^{124}\)

The Supreme Court, in *Hines v. Davidowitz*, enumerated three factors that courts should consider when determining whether Congress intended to preclude state legislation in a particular field of law: "\([(1)] \text{ the nature of the power exerted by Congress, } [(2)] \text{ the object sought to be attained, and } [(3)] \text{ the character of the obligations imposed by the law.}\)\(^{125}\) In *Hines*, the Court struck down a Pennsylvania statute imposing more burdensome registration requirements on legal aliens than those required under the federal Alien Registration Act.\(^{126}\) The Court noted that the Alien Registration Act was just one of several pieces of immigration legislation that comprised the comprehensive naturalization regulatory scheme.\(^{127}\) Applying the three field preemption factors, Justice Black explained that Congress, in accordance with its constitutional authority to regulate immigration, intended to impose a uniform national alien registration requirement that accounted for individual liberty concerns\(^{128}\) and national security needs by imposing minimal registration requirements.\(^{129}\) Citing the comprehensive legislative history—

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120. Boyle v. United Tech. Corp., 487 U.S. 500, 507–08 (1988) ("[W]here the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules.").


124. Id.


126. Id. at 72–74. The Alien Registration Act established a federal registration system for non-citizens present in the United States. Id. at 59–61. Pennsylvania’s registration law was significantly more burdensome and included provisions that Congress had debated and deliberately excluded. Id. at 72–73.

127. Id. at 69.

128. Id. at 73–74. The Court examined the history of federal immigration laws and emphasized Congress’s long-standing reluctance to impose regulations upon non-citizens that intruded upon their liberty or appeared to discriminate overtly. Id. at 69–70. Opponents of aggressive immigration policies claimed that the registration policy violated the principles of freedom and liberty upon which this nation was founded. Id. at 71.

129. Id. at 72–74.
including policy compromises deliberately included to achieve agreement—and the strong interest in uniformity of national immigration laws, the Court held that Congress clearly intended to regulate immigration registration procedures fully and, therefore, Pennsylvania's statute could not stand.  

Similarly, in Hill v. Florida, the Supreme Court found that a Florida statute was preempted because it conflicted with federal law. 131 Although the regulations imposed by the National Labor Relations Act (NLRA) did not rise to the level of field preemption, the Court held that a Florida statute limiting certain union activities was nonetheless preempted by the NLRA because it "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 132 The Court reasoned that Congress, through the NLRA, intended to ensure "full freedom" in employees' bargaining rights and choice of union representation. 133 By allowing only state-licensed business agents to represent labor unions in bargaining negotiations, the Florida statute thwarted Congress's goal of providing citizens "full freedom" in collective bargaining. 134

b. Federal Courts Find that the Supremacy Clause Preempts State and Local Aviation Rules

Courts have relied on the Supremacy Clause to uphold the expansion of federal jurisdiction in aviation law. 135 In City of Burbank v. Lockheed Air Terminal, Inc., the Supreme Court struck down a local noise-control ordinance that restricted the hours during which certain aircraft were permitted to take-off and land at the Hollywood-Burbank Airport. 136 The airport operator challenged the ordinance on grounds of both field and conflict preemption. 137 Although the city of Burbank conceded that the FAA had complete authority to regulate airspace, it maintained that it had the right to pass ordinances pertaining to the use of the airport under its police powers. 138 The Court observed that although the local ordinance was enacted pursuant to the state's deeply rooted police power, the application of innumerable municipal noise ordinances to aircraft take-off and landing would impact flight patterns, which would inhibit the FAA's ability to facilitate air travel. 139 The Court interpreted the authority granted to the FAA under the Federal Aviation Act and the Noise

130. Id. at 73–74.
132. Id. at 539, 542 (internal quotation marks omitted).
133. Id. at 541.
134. Id. at 541–42.
136. Id.
138. Lockheed Air Terminal, 411 U.S. at 638; Lockheed Air Terminal, 318 F. Supp. at 920.
Control Act to establish a pervasive field of regulation, impliedly preempting state law.\textsuperscript{140}

Although some courts have refused to extend \textit{Lockheed Air Terminal} by interpreting federal preemption power narrowly in favor of state law, the presumption against preemption is in decline.\textsuperscript{141} Recent judicial decisions appear to favor security and uniformity over individual states' laws.\textsuperscript{142} While courts have generally hesitated to preempt state common law claims,\textsuperscript{143} they have readily found state laws preempted in areas of national security and commerce.\textsuperscript{144}

\textsuperscript{140} \textit{Id.} at 639–40.

\textsuperscript{141} See, e.g., Gustafson v. City of Lake Angelus, 76 F.3d 778, 783–84 (6th Cir. 1996) (refusing to apply the holding in \textit{Lockheed Air Terminal} to preempt a local ordinance prohibiting planes from landing on a local lake, and construing the FAA's scope of preemption power to extend only to ordinances regulating noise).

\textsuperscript{142} See Berger, \textit{supra} note 87, at 949, 985; see also Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 368, 387–88 (2000) (forgoing a presumption against preemption analysis and preempting a Massachusetts state law penalizing companies for doing business with Burma under the doctrine of implied preemption because the federal government had already initiated sanctions against Burma).

\textsuperscript{143} Perdigao v. Delta Airlines, Inc., 973 So. 2d 33, 37–38 (La. Ct. App. 2007) (ruling that FAA regulations were not so pervasive as to preempt a state tort claim of false imprisonment against an airline for prohibiting a man from moving about when his plane sat on the tarmac for several hours). In \textit{Perdigao}, a man sued Delta Airlines for boarding passengers onto a plane, only to have them sit on the runway for eight hours while the flight crew prevented passengers from moving about the cabin and prohibiting them from obtaining beverages. \textit{Id.} at 34–35, 38. Although the court applied the \textit{Lockheed Air Terminal} holding to the passenger's claim alleging inadequate service, the court ruled that the claim was preempted by the Airline Deregulation Act, which prohibits states from imposing service standards on airlines. \textit{Id.} at 37–38. The court explained, however, that prohibiting a passenger from moving went beyond "service," and thus was not subject to preemption. \textit{Id.} at 38.

\textsuperscript{144} See Berger, \textit{supra} note 87, at 949. National security and the need for uniformity have caused courts to weigh a state's police power and asserted individual liberties less heavily against national laws. \textit{Id.} Constitutional rights and principles are not absolute, but have also become subject to a balancing test, weighing the protection afforded by the Constitution against the need for intrusion. United States v. Edwards, 498 F.2d 496, 499–500 (2d Cir. 1974) (rejecting the passenger's Fourth Amendment claim given that airline security justified conducting a warrantless search of the passenger's bag after the bag set off the magnetometer); see also City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (distinguishing roadblocks conducted by police during a routine crime control as violating the Fourth Amendment from checkpoints and police blocks targeted to thwart terrorists); United States v. Bell, 464 F.2d 667, 674–75 (2d Cir. 1972) (Friendly, J., concurring) ("When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness.").
II. IN ORDER TO FULLY SECURE AIR TRANSPORTATION, TSA MUST HAVE THE AUTHORITY OVER SECURITY IN AREAS OUTSIDE OF SECURITY CHECK POINTS

A. The Language and Legislative History of the ATSA Show that Congress Authorized TSA to Regulate Airport Security, Not Just Checkpoint Security

Congress charged TSA with implementing security procedures to prevent acts of terrorism and other criminal activity from being committed against American transportation infrastructure, particularly aviation. If the scope of TSA’s authority is limited to security checkpoints and the areas beyond those checkpoints, TSA will not be able to effectively execute its aviation security mission. Applying principles of statutory construction to interpret the powers Congress delegated to TSA by enacting the ATSA, it is clear that TSA’s broad authority to impose security policies extends to the entire premises of an airport.

1. The Plain Language of the ATSA

Congress expressly granted TSA authority over airport security under the ATSA. When discerning the meaning of a statute, courts begin by examining the text and assume that the words used carry their ordinary meaning. If the meaning is clear, the analysis ends there.

The ATSA states that TSA shall “oversee the implementation, and ensure the adequacy, of security measures at airports.” The term “airport” is defined in several sections of the United States Code, but no definition limits an airport only to security checkpoints and the areas beyond those checkpoints. A plain meaning interpretation of the ATSA, therefore, dictates that TSA has the authority to regulate security throughout airports.

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146. See infra Part II.A.1, 2.
148. BedRoc Ltd., LLC v. United States, 541 U.S. 176, 178, 183–84 (2004) (rejecting the government’s claim that sand and gravel were “valuable minerals” for purposes of the Pittman Act because the Court assumed Congress intended for the language used in drafting the bill to have its ordinary meaning); SINGER & SINGER, supra note 36, at § 46:1 (elaborating on several interpretations of the plain meaning rule of statutory construction, but concluding that when statutory language clearly and unambiguously demonstrates a legislature’s objectives, courts cannot use canons of construction to give the statute a new meaning).
151. See 49 U.S.C. § 40102(a)(9) (2006) (defining airport as “a landing area used regularly by aircraft for receiving or discharging passengers or cargo”); 49 U.S.C. § 47102(2)(A) (2006) (defining airport as: “(i) an area of land or water used or intended to be used for the landing and taking off of aircraft; (ii) an appurtenant area used or intended to be used for airport buildings or other airport facilities or rights of way; and (iii) airport buildings and facilities located in any of those areas ...”).
Additionally, when reading the statute in its entirety, it becomes even clearer that the ATSA charges TSA with regulating airport security outside of secured areas and security checkpoints.\(^{152}\) This additional consideration is important because courts interpret individual words used in legislation in the context of the entire statute to arrive at a reasonable definition.\(^{153}\) The ATSA references "secure areas" as a part of an airport\(^{154}\) and discusses TSA's security screening responsibilities.\(^{155}\) Given the distinct reference to each area, and applying the ordinary meaning of each word, the word "airport" in the ATSA is not limited to security checkpoints or the areas beyond them.

Moreover, statutes are to be interpreted in a manner that gives effect to every word and clause.\(^{156}\) Congress granted TSA complete authority over security screening personnel and equipment, and over approving protective measures to prevent unauthorized access to secured areas.\(^{157}\) While Congress's directives to TSA regarding checkpoint security and the protection of secured areas are specific as to procedure and location,\(^{158}\) the ATSA includes language specifically granting TSA power to oversee "airport" security.\(^{159}\) If TSA's authority was limited to secure areas and security checkpoints, the provision granting TSA power to implement and oversee airport security would be superfluous. In addition, Congress also gave TSA broad discretionary authority to "carry out such other duties, and exercise such other powers . . . as the Under Secretary considers appropriate."\(^{160}\) Limiting TSA's regulatory authority to secure areas and checkpoints would render whole provisions of the ATSA superfluous, violating a longstanding canon of statutory construction.\(^{161}\)

\(^{152}\) See 49 U.S.C. § 114.
\(^{153}\) United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542–43 (1940) ("To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute.").
\(^{155}\) Id. § 114(e).
\(^{156}\) United States v. Menasche, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section." (internal citation omitted)); SINGER & SINGER, supra note 36, at § 46:6 ("No clause, sentence or word shall be construed as superfluous, void or insignificant if a purpose can be found which will give force to and preserve all the words of the statute.").
\(^{157}\) 49 U.S.C. § 114(d)(1), (e), (f).
\(^{158}\) Id. § 114(e), (f)(14).
\(^{159}\) Id. § 114(f)(11).
\(^{160}\) Id. § 114(f)(15).
\(^{161}\) SINGER & SINGER, supra note 36, at §46:6. While an Airport Safety Plan currently focuses primarily upon preventing unauthorized entrance of secured areas and circumvention of mandatory passenger screening, TSA has, since its inception, facilitated programs to promote security outside airport security checkpoints. 49 U.S.C. § 114(e); 49 C.F.R. § 1542.103 (2008). For example, the ATSA itself included a reimbursement program to be administered by TSA that would compensate airport operators and vendors for costs associated with complying with new airport parking lot security requirements imposed after September 11, 2001. Richard P.
2. Congressional Debate During Enactment of the ATSA

Although Congress clearly intended to federalize airport security, Congress did not explicitly define the physical boundaries beyond which TSA's authority does not extend. When a court is unable to decipher Congress's intent through a textual analysis of the statute, the next step is to examine the legislative history to determine the drafters' intent. In evaluating congressional intent, "the goal is not to look at a general legislative aim or purpose, but instead to see more particularly how the enacting legislature would have resolved the question." Useful factors for analyzing legislative history include the statute's structure, as well as the purpose and intent of the legislation.

Congress passed the ATSA only days before Thanksgiving in 2001, seeking both to restore public confidence in air travel and to prevent another terrorist attack. During Senate consideration of the ATSA Conference Report, Senator John McCain (R-AZ) stated that the bill would "begin a process . . . of increasing airport security, of putting in place procedures and individuals who will [provide] Americans much greater, dramatically enhanced safety and security in airports and on airliners." Senator Jay Rockefeller (D-WV) echoed Senator McCain's sentiments, adding that "[a]irport security is no longer just a transportation issue, it is a national security concern, and the Federal Government will now take on this critical responsibility." These comments are just two examples among dozens of statements made by both

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162. See 49 U.S.C. § 114(e), (f).

163. See id. § 114(d)-(f).

164. Russell v. United States, 551 F.3d 1174, 1178 (10th Cir. 2008) (reviewing the legislative history to determine whether Congress intended to preempt state law in resolving federal tax lien issues). Law professor Cass R. Sunstein argues that the use of legislative intent, as ascertained from congressional debate, to resolve questions of law has the effect of imposing law that was never enacted, resulting in an unwarranted application of the law. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430-34 (1989). Sunstein notes, however, that using legislative intent to resolve questions of ambiguity can be appropriate when the interpretation is corroborated by similar conclusions derived from other principles of interpretation. See id.

165. Sunstein, supra note 164, at 429.

166. Id. at 426.

167. Am. Fed’n of Gov’t Employees v. Hawley, 543 F. Supp. 2d 44, 47 (D.D.C. 2008) (acknowledging that “national security” concerns motivated Congress to enact the ATSA quickly); Dempsey, supra note 20, at 714 (“In order to restore the public’s confidence in flying, three days before Thanksgiving 2001, the U.S. Congress passed [the] ATSA.”).


senators and representatives that indicate an intention to delegate broad airport security to TSA.\footnote{170}{See, e.g., 147 CONG. REC. S11,983 (daily ed. Nov. 16, 2001) (statement of Sen. Kerry) ("For too long the FAA, airports, airlines and private security companies have been able to point fingers at one another without any real improvements being made in security. The Congress has passed law upon law designed to improve things, but these laws never seemed to be fully implemented. That all ends with the passage of this legislation. . . . The Congress has empowered the Federal Government to make serious and lasting improvements in airport security." (emphasis added)); 147 CONG. REC. S11,980 (daily ed. Nov. 16, 2001) (statement of Sen. Warner) ("I am very pleased that House and Senate negotiators have reached agreement . . . to fully federalize security at every airport in the United States."); 147 CONG. REC. S11,978 (daily ed. Nov. 16, 2001) (statement of Sen. Hutchison) ("We are securing the bottom of the airplane. We are securing the cockpit of the airplane. We are securing the airports through which people go."); 147 CONG. REC. H8303 (daily ed. Nov. 16, 2001) (statement of Rep. Ehlers) ("[T]he major gain in the bill is that we have Federal control over the [baggage and security screening] process, we have the Federal Government setting the rules. . . . All of this ensures uniformity from airport to airport."). Even President Bush, as he signed the ATSA into law on November 19, 2001, emphasized the new, powerful role that TSA would play by stating, "[f]or the first time, airport security will become a direct federal responsibility." President Signs Aviation Legislation, Nov. 19, 2001, available at http://www.whitehouse.gov/news/releases/2001/11/20011119-2.html.}\footnote{171}{See supra Part II.A.; see also Am. Fed'n of Gov't Employees TSA Local 1 v. Hawley, 481 F. Supp. 2d 72, 94 (D.D.C. 2006) (noting that the ATSA caption reads: "‘An act to improve airport security, and for other purposes’" (internal citation omitted)).}

As TSA grapples with defining the scope of its authority, the legislative history of the ATSA strongly indicates that TSA is empowered to impose transportation security regulations throughout airports.\footnote{172}{See Dempsey, supra note 20, at 714.} Given the fear of flying most Americans experienced after September 11,\footnote{173}{See id. at 712.} the financial troubles airlines faced as a result,\footnote{174}{See id. at 714.} the pressure on Congress to restore confidence in air travel,\footnote{175}{See supra note 170 and accompanying text.} and the express statements made by lawmakers and the President hailing the full federalization of airport security,\footnote{176}{See Krause, supra note 18, at 244, 247–50.} it is unlikely that Congress would have carved out portions of the airport for TSA to govern, while leaving the remainder of the premises beyond its reach.\footnote{176}{See Krause, supra note 18, at 244, 247–50.}

**B. Supreme Court Decisions Illuminating the Scope of Both the Commerce Clause and the Supremacy Clause to Support Congress's Ability to Delegate Airport Security to TSA**

1. **Ensuring the Security of Airports Is So Closely Related to Commerce that It Warrants Federal Regulation**

When Congress first began regulating the use of national airways, it foresaw air travel as being inextricably linked to the realization of the full potential of
the American economy. As new threats to air travel emerged—ranging from unexplained plane crashes to a surge in hijacking incidents—Congress has enacted legislation to confront those threats, keep Americans safe, and ensure public confidence in air travel. Congress exercised its Commerce Clause power to protect infrastructure critical to the economy from physical attack by enacting the ATSA.

Even in light of the Supreme Court’s narrower interpretation of the Commerce Clause articulated in Lopez, the ATSA’s assertion of federal authority to regulate airport security would survive a Commerce Clause challenge. Specifically, federal regulation of airport security likely meets both the “substantial effects” and “channel of commerce” tests outlined in Lopez and Morrison.

a. “Substantial Effects” Test and Airport Security

In United States v. Corona, the Court found that burning down a taxi company’s building substantially affected interstate commerce because the fire interfered with out-of-state residents’ ability to travel, particularly because the company provided service to the airport. The Corona Court determined that the nexus between the federal arson statute and interstate commerce implicated Congress’s interest in protecting efficient travel, thus permitting federal arson laws that would protect such travel.

Incidents in airport buildings also substantially affect interstate commerce. Since September 11, 2001, even accidental security breaches that resulted in no serious injuries have had significant effects on both air travel and the public’s perception of aviation security. For example, in 2004, four terminals at Los Angeles International Airport (LAX) were evacuated and roads surrounding the airport were closed after an unidentified man with a boarding pass bypassed security screening by entering the terminal through an exit. On the same day at LAX, a small flashlight exploded during baggage screening. Together, the two incidents affected nearly 10,000 passengers, activated the emergency response of 200 state and federal law enforcement officials,
delayed the departure or arrival of nearly 250 flights, and caused 20,000 cars to be rerouted due to road closures. Not only did these two airport incidents interfere with the mobility of thousands of people, they cost the airlines and affected travelers large sums of money. Considering the court's analysis in *Corona*, airports substantially affect interstate commerce, rendering them subject to federal authority in their entirety.

Even if airports are determined not to substantially affect interstate commerce, air transportation and airports have been accepted as a channel of interstate commerce.

b. Airports as Channels of Interstate Commerce

As channels of commerce, airports may be regulated by federal law under the Commerce Clause. Because Congress has the power to regulate airports under the Commerce Clause, it can delegate that authority to TSA.

2. By Enacting the ATSA and Similar Security Statutes, Congress has Established its Intent to Preempt State Regulation

TSA regulations either implicitly preempt state laws governing airport security or are frustrated by state laws and regulations. Assessing congressional intent is the first step in determining the scope of field preemption. Congressional intent to preempt state law is implied when laws or regulations are so pervasive as to preclude state law, or when Congress has manifested a strong interest in governing a particular activity or area. Congress has a long history of regulating aviation security. TSA was created to pursue the security goals of the FAA more aggressively and to

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186. *Id.* In a similar incident at Hartsfield-Jackson Atlanta International Airport in November 2001, Delta Airlines lost between six and eight million dollars when it was forced to shut down its terminal after law enforcement ordered the terminal evacuated because a man breached security to retrieve his camera bag. Nancy Fonti & Craig Schneider, *Lasseter Facing Suit by AirTran*, ATLANTA J. CONST., Nov. 27, 2001, at B2.


188. See *Corona*, 108 F.3d at 569, 571.

189. See *supra* Part I.D.1.b.

190. See *supra* note 100 and Part I.D.1.

191. See *supra* Part I.A.

192. See Berger, *supra* note 87, at 950–51, 980–81 (2003) (synthesizing the impact of the proprietary power exception to FAA regulations and case law narrowly interpreting this exception, concluding that the proprietary power of airport operators is limited to regulations that do not impede the goals of federal regulations designed to protect air travel).


194. See Orelski, 337 F. Supp. 2d at 699, 702.

195. See *supra* Part I.B.
establish security guidelines for airports, not just aircraft.196 The ATSA directed TSA to take specific precautions at security checkpoints197 and to assess and coordinate responses to new threats to aviation and other transportation systems.198 Pursuant to its statutory authorization, TSA has implemented its own comprehensive regulation scheme pertaining to airport security.199 Bearing in mind the pervasive regulatory scheme prescribed by the ATSA and TSA’s regulations, it is apparent that both Congress and TSA intended for federal law to regulate airport security.200

Moreover, the federal government has a strong interest in ensuring aviation security and the long-term viability of the aviation industry.201 Airports and aviation are not only essential to the national economy,202 they are also documented terrorist targets.203 Congress demonstrated its interest in establishing a national, uniform airport security system to shore up the aviation industry and prevent terrorist attacks when it shifted responsibility for checkpoint procedures from private air carriers to TSA, and further directed TSA to approve airport security plans.204 Considering the manner in which Congress deliberated over the ATSA, its history in regulating aviation security, and its goals of achieving national security and protecting the economy, it is apparent that Congress has a strong interest in TSA exercising exclusive authority over airport security.205

Courts will also find conflict preemption when state laws seek to regulate airport security in competition with already existing federal laws.206 In Hill v. Florida, the Court determined that a Florida statute limiting collective bargaining rights guaranteed by federal statute conflicted with federal law.207 Similarly, airport security regulations separately promulgated by individual municipalities would result in the patchwork airport security scheme that Congress intended to avoid.208 Likewise, local regulations hindering TSA’s ability to prevent crimes and violence in areas outside security checkpoints

196. See Francine Kerner & Margot Bester, The Birth of the Transportation Security Administration: A View From the Chief Counsel, 17 AIR & SPACE LAW 1, 21–22 (2002) (chronicling the history of TSA, the impetus behind its creation, and its shift to DHS; and detailing TSA’s specific mandates to shore up aviation security).
198. Id. § 114(f).
199. See id. § 114(l); supra Part I.C.
200. See supra notes 75–84 and accompanying text.
203. See Kirk, supra note 73, at 4.
204. See supra Part I.B., II.A.2.
207. Id. at 542.
208. See supra Part I.B.
would also undermine the comprehensive federal airport security system intended under the ATSA.\footnote{209}

III. TSA’S FAILURE TO BROADLY INTERPRET ITS AUTHORITY JEOPARDIZES AVIATION SECURITY AND UNDERMINES ITS CONGRESSIONAL MANDATE

Having established that the federal government has authority to regulate all aspects of airport security under the Commerce Clause and state attempts to regulate airport security should be preempted by federal law, it is clear that TSA has the authority to regulate airport security. Therefore, TSA should honor the city of Atlanta’s request to modify the security plan for the Hartsfield-Jackson Atlanta International Airport to prohibit individuals from carrying concealed firearms. Indeed, if TSA rejects the City’s application to modify its Airport Security Plan because it believes it lacks the authority, it would abdicate its congressionally mandated responsibility to take whatever security measures are necessary to ensure airport security.\footnote{210} If TSA narrowly interprets what Congress intended to be broad authority, TSA also would limit its ability to issue necessary transportation security regulations in the future.\footnote{211}

TSA has no constitutional authority to act unless Congress delegates regulatory authority that is limited by an intelligible principle.\footnote{212} Congress clearly and unambiguously manifested its intent to delegate authority to TSA when it granted TSA broad power to take the actions necessary to protect the viability and security of air travel.\footnote{213} A critical aspect of aviation security is airport security.\footnote{214} Congress made clear, by enacting the ATSA, that it intended for TSA to oversee security procedures throughout airports.\footnote{215} Because Congress clearly and unambiguously articulated TSA’s authority, TSA has no power to replace Congress’s policy with its own.\footnote{216} Further, asserting TSA’s authority to regulate airports under the broad authority vested

\footnote{210} See id. § 114(e), (f).
\footnote{211} See Richard W. Murphy, Judicial Deference, Agency Commitment, and Force of Law, 66 OHIO ST. L.J. 1013, 1065–66, 1068 (2005) (arguing that a court ought to regard an agency’s interpretative rule with strong deference, requiring only that the interpretation be a reasonable construction of the statute and that it demonstrates a commitment to that interpretation); Quincy M. Crawford, Comment, Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency’s Jurisdiction, 61 U. CHI. L. REV. 957, 958, 960–61 (1994) (discussing the majority, concurring, and dissenting opinions in Mississippi Power and Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988), which concluded that an agency’s interpretation of its jurisdiction is entitled to deference as long as it is a “permissible construction of the statute”).
\footnote{212} See supra Part I.A.
\footnote{214} See Letter from Bennie G. Thompson, supra note 71.
\footnote{215} See supra Part II.A.2.
\footnote{216} See SINGER & SINGER, supra note 36, at § 65:1 (“Where an agency has been charged with administering law, it may not substitute its own policy for that of the legislature.”); supra Part I.A.
in it by Congress would comport with the delegation doctrine because its authority is defined by an intelligible principle.\textsuperscript{217} Should TSA deny its authority to regulate airports, it would fail to execute its congressionally mandated order and undermine the goals Congress sought to achieve in enacting the ATSA and other aviation-related statutes.\textsuperscript{218}

By creating TSA, Congress sought to establish an agency that would preserve the viability of air commerce and address threats to aviation security.\textsuperscript{219} The dangers of concealed firearms pose a substantial threat to economic and personal security.\textsuperscript{220} According to the Assistant General Manager of the Hartsfield-Jackson Atlanta International Airport, gunfire at the airport would result in chaos and a "stampede."\textsuperscript{221} It is well documented that concealed firearms can be, and often are, discharged accidentally.\textsuperscript{222} Accidental or purposeful discharge of firearms would result in large-scale evacuations or worse, rendering airports a dangerous battleground in which citizens, surrounded by fully fueled airplanes, take law enforcement into their own hands.\textsuperscript{223} If TSA refuses to embrace its statutory authority to prevent armed citizens from patrolling American airports, it will be abdicating its congressional mandate to preserve both the viability of air carriers and public confidence in flying.\textsuperscript{224}

V. CONCLUSION

The American aviation industry faces historic threats of attack and disruption by terrorists and other criminals. Another attack like the one carried out on September 11, 2001, would paralyze the national economy and result in another devastating death toll. To thwart future attacks against air travel—a top terrorist target—Congress created TSA to serve as the central command for aviation security. In doing so, Congress purposefully equipped TSA with broad authority to regulate all activities and components of air travel necessary to prevent another terrorist attack.

Through the Commerce and Supremacy Clauses, Congress delegated to TSA the power to regulate airport security. TSA's mission is broad in scope and is intended to be executed aggressively. If TSA fails to take over airport security, the aviation industry will remain vulnerable to future attacks and the American economy, which relies heavily on the multi-billion dollar industry, will suffer

\textsuperscript{217} See supra Part I.A.
\textsuperscript{218} See 49 U.S.C. § 114(c)–(f) (2006).
\textsuperscript{219} See supra Part I.B.
\textsuperscript{220} See Rankin, supra note 14.
\textsuperscript{221} Id.
\textsuperscript{223} See Rankin, supra note 14.
the consequences. Moreover, by narrowly construing its authority with respect to aviation, TSA will set a precedent for interpreting its authority in a manner that limits its power to regulate other modes of transportation. Congress did not intend these consequences. In order to pursue the goals established under the ATSA, TSA must assert its authority to regulate security throughout airports and grant the city of Atlanta's request to ban concealed firearms at its airport.